

JUL 31 2008

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID CARO-GRIMALDO,

Defendant - Appellant.

No. 07-50486

D.C. No. CR-04-01966-JAH-1

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Southern District of California  
John A. Houston, District Judge, Presiding

Submitted July 22, 2008<sup>\*\*</sup>

Before: B. FLETCHER, THOMAS, and WARDLAW, Circuit Judges.

David Caro-Grimaldo appeals from the 34-month sentence imposed on  
resentencing following his guilty-plea conviction for being a deported alien found

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without  
oral argument. *See* Fed. R. App. P. 34(a)(2).

in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Caro-Grimaldo contends that the district court erred under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by enhancing his sentence based on his removal subsequent to a prior conviction, when his indictment did not allege the date of the prior removal. He further contends that the error was structural.

As a preliminary matter, we conclude that neither the scope of this Court's prior remand for resentencing nor the law of the case doctrine precludes review of Caro-Grimaldo's *Apprendi* challenge. *See United States v. Matthews*, 278 F.3d 880, 885-86 (9th Cir. 2002) (en banc); *see also United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995). However, we reject Caro-Grimaldo's contention that the failure to allege the date of removal in his indictment constituted structural error, and we conclude that any error was harmless. *See United States v. Salazar-Lopez*, 506 F.3d 748, 751-56 (9th Cir. 2007).

**AFFIRMED.**